Filed 3/22/10 Ivory v. TLSF CA1/4

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

| | |
|---|---|
| JUDITH IVORY et al.,<br>Plaintiffs and Respondents,<br>v.<br>TLSF etc., et al.,<br>Defendants and Appellants. | A124122<br><br>(San Francisco City & County Super. Ct. No. CGC-07-460838) |

**I.**

Defendants TLSF, LLC, Emmanuel P. Vlazakis, Maria A. Barbis, Athanasia V. Vlazakis, and George M. Vlazakis, former trustees and successor trustees of the Vlazakis Family Trust, and Rakesh B. Patel and Rashmika Patel (the Patels[1]), appeal from an order granting plaintiff Paul LeBlanc (LeBlanc) discretionary relief from default pursuant to Code of Civil Procedure section 473, subdivision (b) (section 473(b)). We conclude that the trial court did not abuse its discretion in granting relief from default and therefore affirm.

**II.**

LeBlanc is a class member in a class action filed against defendants, who are alleged to be the owners, managers, or operators of a residential hotel at 201 Leavenworth Street in San Francisco known as the Hurley Hotel. A multi-cause of action complaint was brought on behalf of present and former residents of the hotel for damages

[1] The Patels joined in this appeal on March 1, 2010.

caused by the hotel's alleged uninhabitable conditions. While LeBlanc was within the class of plaintiffs suing, he was not a named or representative class member. An answer was filed on behalf of defendants on September 12, 2007, denying the allegations of the complaint, and asserting 58 affirmative defenses.

On May 29, 2008,[2] plaintiffs filed an application to certify the class for purposes of approving a settlement which had been reached with defendants. The application was made by attorney Scott Weaver of the law firm of Wartelle, Weaver & Schreiber, and was granted by the trial court on that same day. As part of the settlement, a payment to class members and their attorneys totaling $750,000 was to be made by, or on behalf of, defendants. In return, the settling class members would release defendants from all liability for damages, "including personal injury and emotional distress claims," arising out of the alleged conditions at the Hurley Hotel.

The settlement also included an "opt-out" provision, by which any member of the class could reject the settlement, and not be bound by it. The provision required, in part, that any written opt out must be received by plaintiffs' counsel or postmarked no later than July 18. Class counsel Scott Weaver filed a declaration, signed on July 30, averring that he mailed notice of the proposed settlement, including the right to opt out, "on or before" June 25. The notice was sent to persons identified on Exhibit 1 attached to Weaver's declaration, including "known class members who contacted our office, known class members whose names appeared in annual unit usage reports, and addressees at each of the units of the Hurley Hotel . . . ." In addition, service was made on "service agencies who may have contact with past or present tenants . . . ." Exhibit 1 included a declaration of service indicating that a copy of the notice was sent to "Paula Blanc[,] Hurley Hotel #211[, . . .]," "Paul LeBlanc[,] c/o Andrew Klimenko, Esq.[,] The Dolan Law Firm[,] 1438 Market St.[,] San Francisco, CA 94102," "Paul LeBlanc[,] Lenain Bldg[.,] 730 Eddy St.[,] San Francisco, CA 94109," and "Paul LeBlanc[,] c/o Korika Wright, Case Manager[,] 730 Eddy St.[,] San Francisco, CA 94109."

[2] All further dates are in the calendar year 2008, unless otherwise indicated.

On August 21, LeBlanc filed a motion to be relieved of his default caused by the late submission of his opt-out notice, pursuant to both the mandatory and discretionary provisions of Code of Civil Procedure section 473. LeBlanc was represented in this motion by attorney Andrew Klimenko of The Dolan Law Firm.

Supporting the motion were declarations from Mr. Klimenko and Ms. Christina Schreiber, an attorney with the Wartelle, Weaver & Schreiber law firm. In his declaration, Klimenko stated that his law firm had been separately contacted by LeBlanc regarding a potential personal injury action against defendants arising as a result of a fire that occurred in his room at the Hurley Hotel in 2006. During counsel's investigation, he learned of the pending class action settlement, and that LeBlanc was a member of the class.[3] Because LeBlanc wanted to opt out of the class settlement in order to pursue his personal injury action directly, Klimenko called Schreiber to learn about the "procedural aspects" of the class action. Schreiber advised Klimenko that if LeBlanc wished to opt out of the class action settlement, he must do so by July 30. Klimenko calendared this date, and delivered the opt-out form to Schreiber's office on July 25. He was then contacted by Schreiber, who informed him that the actual deadline had been July 18 (making his submission one week late), and that she had given him the incorrect date of July 30 because she had confused this case with another case on which she was working, which had a July 30 deadline. Klimenko noted in his declaration that he had worked with class action counsel on prior cases over several years and "appreciated their expertise and high degree of competence and I therefore did not independently determine if the initial advice was incorrect."

[3] Klimenko did not confirm that he received a copy of the notice of settlement and related documents, as indicated by Scott Weaver's declaration, nor did defendants argue below that the documents were actually in Klimenko's possession before July 18. Defendants take this position on appeal. While it is unclear on this record whether Klimenko had the court document indicating the opt-out deadline was July 18, we conclude the trial court did not abuse its discretion in granting discretionary relief from the default even assuming he had, and instead decided to call Schreiber for the information.

These facts were confirmed separately by Schreiber's declaration. Schreiber added that when Klimenko called, she confused the two cases because she was then under considerable pressure to complete an opposition to a motion for summary judgment pending in federal court in another action.

The motion for relief of default was opposed by defendants. Inter alia, defendants argued that LeBlanc would not be prejudiced by denying him relief because he had another personal injury action pending against certain third-party entities he claimed were responsible for his injuries, who were not parties to the class action and the pending settlement. Defendants also argued that, to the contrary, they would be prejudiced by granted the requested relief because they "[would] lose the benefit of [their] bargain to avoid costly and expensive litigation related to the subject property, despite paying a substantial settlement to class members."

The trial court issued a written order filed on December 8, granting LeBlanc's motion under the discretionary provision of section 473(b). In its order, the court noted that it was reasonable for Klimenko to rely on Schreiber's representation. As to prejudice, the court concluded that, while defendants referenced a pending action against third party entities for LeBlanc's personal injuries, defendants did not state that denial of the relief would allow LeBlanc to prosecute that separate action *as to them.* On the other hand, LeBlanc was only 1 of approximately 300 class members, the settlement did not include a provision that allowed defendants to terminate the settlement based on the number of opt-outs submitted, and therefore, there was no indication that the settlement was entered into in reliance on LeBlanc's participation.

## III.

### A.

Initially, we note that the trial court granted the motion only on the basis of discretionary relief afforded under section 473(b). Thus, the issue of whether the court erred in refusing to grant the motion under the mandatory provision of that same statute is not before us on this appeal.

The standard of review on appeal from an order granting or denying discretionary relief under section 473(b) was articulated by the California Supreme Court 25 years ago in *Elston v. City of Turlock* (1985) 38 Cal.3d 227 (*Elston*), superseded by statute on another point as stated in *Tackett v. City of Huntington Beach* (1994) 22 Cal.App.4th 60, 64): "A motion seeking such relief lies within the sound discretion of the trial court, and the trial court's decision will not be overturned absent an abuse of discretion. [Citations.] However, the trial court's discretion is not unlimited and must be ' "exercised in conformity with the spirit of the law and in a manner to subserve and to impede or defeat the ends of substantial justice." ' [Citations.] [¶] Section 473 is often applied liberally where the party in default moves promptly to seek relief, and the party opposing the motion will not suffer prejudice if relief is granted. [Citations.] In such situations 'very slight evidence will be required to justify a court in setting aside the default.' [Citations.] [¶] Moreover, because the law strongly favors trial and disposition on the merits, any doubts in applying section 473 must be resolved in favor of the party seeking relief from default [citations]. Therefore, a trial court order denying relief is scrutinized more carefully than an order permitting trial on the merits. [Citations.]" (*Elston*, *supra*, at p. 233, fn. omitted.)

**B.**

"To obtain discretionary relief under section 473, the moving party must show the requisite mistake, inadvertence, or excusable neglect. [Citations.]" (*Fasuyi v. Permatex, Inc.* (2008) 167 Cal.App.4th 681, 694.)

" 'A party who seeks relief under section 473 on the basis of mistake or inadvertence of counsel must demonstrate that such mistake, inadvertence, or general neglect was *excusable* because the negligence of the attorney is imputed to his client and may not be offered by the latter as a basis for relief.' (*Generale Bank Nederland v. Eyes of the Beholder Ltd.* (1998) 61 Cal.App.4th 1384, 1399 . . . .) In determining whether the attorney's mistake or inadvertence was excusable, 'the court inquires whether "a reasonably prudent person under the same or similar circumstances" might have made the same error.' " ' (*Bettencourt v. Los Rios Community College Dist.* (1986) 42 Cal.3d 270,

276 . . . .) In other words, the discretionary relief provision of section 473 only permits relief from attorney error 'fairly imputable to the client, i.e., mistakes anyone could have made.' (*Garcia* [*v. Hejmadi* (1997)] 58 Cal.App.4th [674,] 682.) 'Conduct falling below the professional standard of care, such as failure to timely object or to properly advance an argument, is not therefore excusable. To hold otherwise would be to eliminate the express statutory requirement of excusability and effectively eviscerate the concept of attorney malpractice.' (*Ibid.*)" (*Zamora v. Clayborn Contracting Group, Inc*. (2002) 28 Cal.4th 249, 258, italics omitted.)

The facts underlying the ruling on review are brief. LeBlanc went to attorney Klimenko to pursue a separate personal injury claim he had against defendants. Klimenko learned of the pendency of the class action settlement and of the fact that LeBlanc was a member of that class. Klimenko may or may not have actually received a copy of the settlement documents himself. In any event, Klimenko contacted the attorneys of record handling the litigation for the class and asked specifically about the deadline for the opt out. He was given an incorrect date, but he submitted the opt-out form within the timeframe mentioned by class counsel. Klimenko had worked with class counsel on other occasions, and found them to be competent. Thus, he had no reason to doubt as to the correctness of Schreiber's information, or to investigate the issue further.

Under these facts, it was not an abuse of discretion to find that Klimenko acted reasonably, and that his error submitting the opt-out form one week late was the result of a mistake which was excusable.

In exercising discretion either to grant or to deny section 473 relief, the exercise is one based largely on the particular facts of each case. For this reason, while defendants cite a number of cases in support of the contrary view, each of them is factually distinguishable. The closest facially appear to be *Huh v. Wang* (2007) 158 Cal.App.4th 1406, and *Ambrose v. Michelin North America, Inc.* (2005) 134 Cal.App.4th 1350 (*Ambrose*). However, upon closer examination, neither case is applicable here, or compels the conclusion that the lower court here abused its discretion in granting relief to LeBlanc.

In *Huh v. Wang*, summary judgment was entered against the plaintiff when counsel failed to file a timely opposition to the motion. (*Huh v. Wang*, *supra*, 158 Cal.App.4th at p. 1412.) The lower court refused to grant either mandatory or discretionary relief from this default and allow an opposition be filed. In affirming the lower court, the appellate court relied on the facts that the plaintiff failed to act with due diligence in seeking relief, and because the basis for the tardy motion for relief was the conclusory statement that counsel overlooked the filing dated due to the "press of business." (*Id.* p. 1423.)

As to the lack of diligence, the court found important that as of February 2006, counsel realized that no opposition to the motion for summary judgment had been filed. However, it was not until July 31, some five months later that the motion for relief from the default was made. (*Huh v. Wang*, *supra*, 158 Cal.App.4th at pp. 1420-1421.) As to the second issue, the court found that the defaulting attorney's mere conclusory declaration that the filing deadline was missed because counsel was too busy with other matters was inadequate reason to justify relief. (*Id.* at p. 1424.) The court distinguished the reason in that case from cases involving deadlines missed for clerical reasons, which can justify a grant of relief under section 473(b). (*Ibid.*)

Similarly, in *Ambrose*, the error was the failure of counsel to request a continuance of a summary judgment hearing because the attorney was too busy. In noting that this reason alone was insufficient, the court observed that this was not an instance where the mistake was the result of "a glitch in office machinery or an error by clerical staff," but was solely the result of the lawyer being too busy. This reason did not amount to excusable neglect. (*Ambrose*, *supra*, 134 Cal.App.4th at pp. 1354-1355.)

Here, the lawyer representing LeBlanc, who had responsibility to timely submit the opt-out form, was attorney Klimenko from The Dolan Law Firm. Unlike the facts in *Huh v. Wang* or *Ambrose*, his error was not caused by the press of other business, but because he had been given an incorrect date by another attorney, whom he had no reasonable basis to question. He submitted the opt-out form within the erroneous time limit provided to him, and in fact, the form was only one week late. Also, unlike *Huh v.*

*Wang*, Klimenko diligently brought the matter to the court's attention, and promptly filed a motion for relief from default.

Defendants argue that these decisions are applicable to attorney Schreiber's conduct, because she admits having given Klimenko the incorrect date, in part, because she was stressed out over a pending deadline in another matter. But, as we have already pointed out, it was Klimenko's actions that were the focus of the motion for relief, not Schreiber's, who was in no position to assist LeBlanc in his decision to opt out given her status as class counsel. (See generally *Torrisi v. Tucson Elec. Power Co.* (9th Cir. 1993) 8 F.3d 1370, 1378.)

Even if LeBlanc could be charged with Schreiber's actions under these circumstances, there was no basis to find an abuse of discretion in the trial court's implicit finding that the error she made was also excusable. Here, Schreiber simply confused the opt-out deadline in this case with the deadline in another pending case. She did not miss a deadline because she was too busy, like the attorneys in *Huh v. Wang* and *Ambrose.* She did not forget a deadline, but simply mixed up the dates in two cases. While excusable neglect does not include errors that might otherwise be termed malpractice, or that fall below the professional standard of care, the concept does include errors that any person without special training or skill might have made. (*Zamora*, *supra*, 28 Cal.4th at p. 258.) This is precisely the type of error that courts have found to be excusable, assuming that Schreiber's conduct is relevant and chargeable against LeBlanc.

As to the issue of prejudice, while he may have a claim against third parties for the injuries he sustained in the hotel fire, there is little doubt that LeBlanc would be barred from suing defendants on the breadth of the release in the class action settlement. On the other hand, we agree with the trial court that there is no indication that defendants acted in reliance on LeBlanc being bound by the settlement, nor did they avail themselves of procedural steps to ensure the number of opt outs would be limited. Under these circumstances as well, the interests of justice amply justify the granting of the relief sought by LeBlanc below. (*Elston*, *supra*, 38 Cal.3d at p. 233.)

**C.**

The last argument advanced by defendants, with little supporting authority, is that the failure to opt out timely is not a "proceeding taken against" the moving party, within the meaning of section 473(b). We disagree.

While the parties do not cite any California cases directly on point, LeBlanc notes that section 473(b) has been applied in a myriad of circumstances by appellate courts of this state, demonstrating the breadth of what constitutes a "proceeding taken against" a party. (*Elston*, *supra*, 38 Cal.3d 227 [relief proper for failure to file timely responses to request for admissions]; *Russell v. Trans Pacific Group* (1993) 19 Cal.App.4th 1717 [failure to file timely motion for attorney fees].) Indeed, the language of the statute is broad as to the types of proceedings subject to the rule, and includes any "judgment, dismissal, *order*, or other proceeding taken against him or her through his or her mistake, inadvertence, surprise, or excusable neglect." (Section 473(b), italics added.)

Here, the order taken against LeBlanc was that which confirmed the class settlement as to him. This is just one of the many types of orders subject to relief from default under the statute.

Moreover, while there is no case directly on point, LeBlanc has referred us to several federal decisions which have applied the federal procedural analogue to section 473(b) (Fed. Rules Civ. Proc., rule 60(b)) to relieve a class member of default for not timely filing an opt-out declaration. (*Augst-Johnson v. Morgan Stanley & Co., Inc.* (2008) 247 F.R.D. 25; *DaSilva v. Esmor Correctional Services, Inc.* (2003) 215 F.R.D. 477, 483.)

We conclude that the order confirming the settlement as to LeBlanc because he untimely submitted his opt out is a "proceeding taken against" him, within the meaning of section 473(b).

**IV.**

The order granting LeBlanc leave from default is affirmed. Costs on appeal are awarded to LeBlanc.

_____
RUVOLO, P. J.

We concur:

_____
SEPULVEDA, J.

_____
RIVERA, J.